

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CENTRAL MUTUAL INSURANCE
COMPANY,

Plaintiff,

v.

ANTHONY PALACIOS and
ROY ROBERSON

Defendants.

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Civil Action No. 4:22-1388

**PLAINTIFF’S REQUEST FOR CLERK’S ENTRY OF DEFAULT
AGAINST DEFENDANT ANTHONY PALACIOS**

COMES NOW Plaintiff Central Mutual Insurance Company (“CMIC”) and, pursuant to Federal Rule of Civil Procedure 55, respectfully requests the Clerk of Court to enter a default against Defendant Anthony Palacios (“Palacios”), and shows as follows:

1.

This is a suit on an insurance policy issued to AV Warehousing & Crating, LLC (“AV Warehousing”). CMIC seeks a determination that it has no obligation to defend or indemnify Palacios for allegations asserted against him in an underlying state court lawsuit styled as follows: *Roy Roberson v. AV Warehousing & Crating, LLC, et al.* Cause No. 2020-51214 pending in the 269th District Court, Harris County, Texas (“Underlying Lawsuit”).

2.

CMIC filed its Original Complaint for Declaratory Judgment on May 2, 2022 against Palacios and the Plaintiff in the Underlying Lawsuit, Roberson. *See* Compl. for Declaratory J. ECF No. 1.

On May 4, 2022, this Court issued a summons in this action for Palacios. *See* Summonses

to Defs., ECF No. 5. Because service could not be effected on Palacios after multiple attempts, CMIC filed an Unopposed Motion for Substituted Service with the Court and the Court granted CMIC's motion. *See* P. Unopposed Motion for Sub. Service (filed Aug 19, 2022) ECF No. 7 and Order ECF No. 9. Palacios was served on August 24, 2022. *See* Return of Service to Palacios (filed Aug. 26, 2022), ECF No. 11. As of yet, no answer has been filed on behalf of Palacios.

3.

The Clerk of the Court may enter a default against a party who has not filed a responsive pleading or otherwise defended the suit, as long as the affirmative relief sought is a calculable sum certain. Fed. R. Civ. P. 55(a), (b)(1). Here the sum certain is zero dollars (\$0.00), as CMIC seeks a judicial declaration that it owes no defense or indemnity to Palacios for the Underlying Lawsuit.

4.

The Clerk should enter a default against Palacios because he has not filed an answer within twenty-one (21) days after the date of service. Fed. R. Civ. P. 12(a)(1)(A).

By virtue of its default, Palacios is deemed to have admitted the truth of the well-pleaded allegations of CMIC's complaint. In particular, Palacios has judicially admitted the following:

A. CMIC issued Policy No. BAP 8667927 10 to AV Warehousing & Crating, LLC, and AV Metals, LLC, for the period of May 29, 2020, to May 29, 2021. ¶ 4.1

B. The CMIC policy defines what constitutes an insured party. Provision 6.4 (b) (3) of the policy states that an insured driver is "anyone else while using with your permission a covered 'auto' you own, hire or borrow except: Someone using a covered 'auto' while he or she is working in a business of selling, servicing or repairing 'autos' unless that business is yours." *See* Compl. for Declaratory J. ECF 1. ¶ 4.2

C. When the incident at issue in the Underlying Lawsuit occurred, AV Warehousing is not alleged to have given Palacios permission to use the insured truck. Additionally, Palacios was operating the covered vehicle while working in a business of servicing or repairing autos that did not belong to AV Warehousing. ¶ 4.3

D. Because Palacios failed to comply with the above-referenced Condition for Coverage, CMIC was prejudiced as a matter of law, and there is no coverage for the Underlying Lawsuit under the Policy. Compl. for Declaratory J. ECF 1. ¶ 4.4.

WHEREFORE, PREMISES CONSIDRED Central Mutual Insurance Company prays the Clerk of the Court enter Default against Anthony Palacios and for such other and further relief, at law or in equity, to which it may show itself justly entitled and for which it shall ever pray.

Respectfully submitted,

/s/ Stephen A. Melendi

Stephen A. Melendi – Attorney-in-charge

State Bar No. 24041468

Southern District No. 38607

stephenm@tbmmlaw.com

Matthew Rigney

State Bar No. 24068636

Southern District No. 2870042

mattr@tbmmlaw.com

TOLLEFSON BRADLEY MITCHELL &
MELENDI, LLP

2811 McKinney Avenue, Suite 250

Dallas, Texas 75204

Telephone: 214-665-0100

Facsimile: 214-665-0199

**ATTORNEYS FOR PLAINTIFF
COLONY INSURANCE COMPANY**

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2022 a true copy of the foregoing was served on all counsel of record via the Court's CM/ECF system pursuant to the Federal Rules of Civil Procedure:

/s/ Stephen A. Melendi

Stephen A. Melendi